HOGUET NEWMAN
REGAL & KENNEY, LLP

10 East 40th Street
New York, New York 10016

Tel 212.689.8808
Fax 212.689.5101
www.hnrklaw.com

abourne@hnrklaw.com

August 24, 2017

VIA HAND DELIVERY

Hon. Shirley Werner Kornreich
Supreme Court of the State of New York
New York County Courthouse
60 Centre Street, Room 555
New York, NY 10007

Re: *Hudson Ins. Co. v. Isaza Tuzman, et al.*, Index No. 155869/2016

Dear Justice Kornreich,

We represent Defendant Kaleil Isaza Tuzman and respectfully submit a courtesy copy of our letter-brief e-filed yesterday and a full complement of attachments, submitted in connection with defendant Robin Smyth's July 27, 2017 deposition.

It was our intention to fully comply with this Court's August 17, 2017 Order and e-file the deposition transcript yesterday—with phone numbers and email addresses redacted—together with the rest of the letter-brief. It is worth noting that at the time of the deposition, counsel for Smyth stated that he did not consider anything in the deposition confidential, and saw no reason to seek to have it sealed. However, recent events–including a threat from the U.S. Attorney's Office overseeing the criminal prosecution of Mr. Isaza Tuzman—makes it prudent to seek guidance from this Court before publicly filing Smyth's deposition.

The U.S. Attorney's Office has taken the untenable position that the taking of Smyth's deposition—pursuant to this Court's Order—was itself a violation of the Protective Order, [1] and therefore the public filing of the transcript would constitute yet another violation of the Protective Order. This is incorrect; the Protective Order applies to documents, not testimony. The fact that testimony addresses some subjects that are also subjects in protected documents does not make the testimony subject to the Protective Order.[2]

[1] The Protective Order was issued by Judge Gardephe on August 9, 2017, but the parties had agreed to abide by its terms while the proposed order was awaiting the Court's signature. A copy of the Protective Order is attached to this letter as Exhibit A.

[2] We offered to omit from the public filing deposition exhibits that the U.S. Attorney's Office considers subject to the Protective Order, but the government took the position that this would not suffice.

HOGUET NEWMAN REGAL & KENNEY, LLP

On August 3, 2017, the prosecutors made belated objections to the July 27, 2017 deposition (despite having advance knowledge of it) in a letter to the presiding judge in the criminal case, The Honorable Paul G. Gardephe, U.S. District Judge for the Southern District of New York. *See* Ex. B. In their letter, the prosecutors expressed the view that the deposition was "concerning" because it was "not supported by the letter or spirit of the protective order" pertaining to the use of certain discovery material. However, the letter alluded to only a *single* document (a one-page organization chart, which the government neither expressly identified nor referenced by Bates number) that the government contended was used at the deposition in violation of the Protective Order. The letter otherwise referenced merely generic concerns about discovery produced in connection with the criminal case, advancing a theme that "counsel's questioning appears to have been a pretextual effort to prepare for the criminal trial."

This accusation demonstrated the government's failure to recognize that Smyth's credibility is central to this insurance case. Counsel for Mr. Isaza Tuzman responded, explaining in detail why the use of any documents produced in the SEC and criminal cases complied with the terms of the proposed protective order, and noting that the government had been repeatedly advised as to the purpose and scope of the deposition in this action but had declined to intercede or limit it in any way. Ex. C. We intend to show that Smyth fabricated evidence against Mr. Isaza Tuzman, and our ability to demonstrate that may well determine whether Mr. Isaza Tuzman is able to access the insurance coverage to which he is entitled.

Given every opportunity to pursue the matters raised in their August 3 letter, the U.S. Attorney's Office sat on their hands. Six days after filing their letter, the prosecutors appeared at a status conference in the criminal case at which a multitude of motions and issues were addressed. Not once during that status conference did the government raise any issues as to the confidentiality of the deposition or any documents used in connection with it. Not once did they press their arguments that the use of any documents from the criminal action violated the protective order. No fewer than three times did Judge Gardephe ask if there were any other issues the lawyers would like to raise, and each time the prosecutors answered in the negative, thereby waiving their objections to the Smyth deposition. Transcript of August 9, 2017 hearing in *United States v. Isaza Tuzman*, S8 15 CR 536 (PGG), at 14:23-25 (Court: "Any other issues the lawyers want to raise. Anything?" [AUSA] Griswold: "No, your Honor, not from the government"); 25:14-16 & 26:16-21 (Court: ". . . are there any other issues the parties want to raise?" Griswold: "I think there is one other issue. There was a request from Gibson, Dunn for a Rule 15 deposition of Andy Stewart"); 28:3-6 (Court: "Anything else?" Griswold: "Nothing from us, your Honor, thank you.").

Yesterday, in preparation for filing our letter-brief, we advised the U.S. Attorney's Office that, pursuant to the Order entered by Your Honor on August 17, 2017, we intended to publicly file the Smyth deposition transcript. And yesterday, the government expanded its objection to a single document used in the deposition into a blanket objection to practically the entire deposition transcript, "[t]he only exception, perhaps, [being] the few pages where you looked at the insurance policies (pp. 132-58)" according to AUSA Joshua Naftalis. We asked the U.S. Attorney's Office to specify the questions and answers they deemed confidential, and offered to consider redacting those excerpts from the public record, but they refused.

HOGUET NEWMAN REGAL & KENNEY, LLP

AUSA Naftalis proceeded to make unfounded *ad hominem* accusations against my partner Ilene Jaroslaw, who took the deposition. Ms. Jaroslaw offered to delay the public filing of the deposition to afford the U.S. Attorney's Office an opportunity to seek relief from this Court. Instead of pursuing a remedy before Your Honor, AUSA Naftalis used this newly-manufactured "dispute" (as to whether testimony is covered under a Protective Order that addresses only documents) as a threat to deter us from publicly filing the transcript.

Accordingly, we seek guidance from the Court concerning the public filing of the deposition transcript, which we provide to Chambers as an attachment to the courtesy copy of the letter brief transmitted herein.

Very truly yours,

Andrew N. Bourne

Attachments

cc: All Counsel of Record (via NYSCEF)
Michael Bachner, Esq. (via e-mail and hand delivery)
Robin Smyth (via e-mail)
The Honorable Paul G. Gardephe (via ECF)
Assistant U.S. Attorney Andrea M. Griswold
Assistant U.S. Attorney Joshua A. Naftalis
Assistant U.S. Attorney Damian Williams

EXHIBIT A

Case 1:15-cr-00536-PGG Document 319-1 Filed 06/20/17 Page 1 of 5

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: ______
DATE FILED: 8/9/17

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v. -

KALEIL ISAZA TUZMAN,

Defendant.

PROTECTIVE ORDER

S8 15 Cr. 536 (PGG)

PAUL G. GARDEPHE, District Judge:

On the motion of the United States of America, by Preet Bharara, United States Attorney, through his counsel, Damian Williams and Andrea Griswold, Assistant United States Attorneys ("the Government"), pursuant to Federal Rule of Criminal Procedure 16(d), on consent of the defendant, through his counsel, Avi Weitzman, Esq., and for good cause shown,

IT IS HEREBY ORDERED:

1. With exceptions of (1) publicly available materials, (2) materials that become public, and (3) materials that were or are obtained by the defendant through means other than receipt of discovery materials from the Government in this case, all materials, including documents and the information contained therein, electronic data, and other audio or visual materials that are provided by the Government to the defendant in this action pursuant to Rule 16 of the Federal Rules of Criminal Procedure, Title 18, United States Code, Section 3500;

Brady v. *Maryland*; or *United States* v. *Giglio*, (hereinafter "Government Materials") are considered "Confidential Information."

2. Absent further order of the Court, Confidential Information disclosed to the defendant or to his counsel in this case during the course of proceedings in this action:

(a) Shall be used by the defendant and his counsel only for purposes of defending this criminal action and *S.E.C.* v. *Kaleil Isaza Tuzman* (the "SEC Action");

(b) Shall not be disclosed in any form by the defendant or his counsel except as set forth in paragraph 2(c) below; and

(c) May be disclosed by the defendant or his counsel in this action only to the following persons (hereinafter "Designated Persons"):

(i) investigative, secretarial, clerical, paralegal, student personnel, and any other personnel employed full-time or part-time by the defendant's counsel;

(ii) potential expert witnesses, consultants, investigators, and/or other personnel retained by and/or working under the direction of defense counsel in connection with this action or the SEC Action;

(iii) prospective witnesses, and/or their counsel; and

Case 1:15-cr-00536-PGG Document 319-1 Filed 06/20/17 Page 3 of 5

(iv) such other persons as hereafter may be authorized by agreement, in writing, of the parties or by the Court upon the defendant's motion.

3. Confidential Information disclosed to the defendant or to his counsel during the course of proceedings in this action, including any and all copies made of said material, shall be returned to the Government or shredded, erased, and/or destroyed, as the case may be, upon the conclusion of this criminal action and the SEC Action, specifically within 90 days upon expiration of either the period for direct appeal from any verdict, the issuance of an appellate decision rendering a final judgement, or the conclusion of any collateral appeal or attack on any decision in this criminal action or the SEC Action.

4. The defendant and his counsel shall provide a copy of this Order to Designated Persons to whom they disclose Confidential Information pursuant to paragraphs 2(c)(i)-(iv). Designated Persons shall be subject to the terms of this Order and shall sign an acknowledgment, to be retained by the defendant's counsel, indicating that they have received and reviewed the terms of this Order and understand that they are bound by it before being provided with, shown, or read the contents of any materials produced pursuant to terms of this Order. In addition, if Confidential Information is provided to

any Designated Persons, counsel shall inform such persons that they must destroy such materials as set forth in paragraph 3.

5. The defendant and his counsel will not attach any materials produced pursuant to this Order to any public filings with the Court or publicly disclose any such materials, or their contents in any other manner, without prior notice to the Government. If the defense and the Government cannot agree on the manner in which the documents or their contents may be publicly disclosed, the parties shall seek resolution of such disagreements by the Court.

6. If any dispute should arise between the parties to this action as to whether any documents, materials or other information is Confidential Information subject to the provisions of this Order, such documents, materials and information shall be considered Confidential Information pending further Order of this Court.

7. The provisions of this Order shall not be construed as preventing the disclosure of any information in any motion, hearing or trial held in this action or to any district or magistrate judge of this Court for purposes of this action.

Dated: New York, New York
~~June ___, 2017~~
August 9, 2017

Paul G. Gardephe

HONORABLE PAUL G. GARDEPHE
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF NEW YORK

EXHIBIT B

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

August 3, 2017

BY CM/ECF

The Honorable Paul G. Gardephe
United States District Judge
Southern District of New York
40 Foley Square, Room 2204
New York, NY 10007

Re: United States v. Kaleil Isaza Tuzman
S8 15 Cr. 536 (PGG)

Dear Judge Gardephe:

The Government writes to apprise the Court of recent events relevant to the proposed protective order submitted by the Government on June 20, 2017, and to request that the Court enter the protective order and deny the defendants' motion to adjourn the trial.

Over one year ago, on July 11, 2016, the Government sent a proposed protective order (the "2016 Proposed Order") to counsel for Kaleil Isaza Tuzman at Gibson Dunn & Crutcher LLP. Gibson Dunn responded that while it intended to propose changes, it would agree "to abide by the terms of the government's July 11, 2016 proposed protective order until a Court-issued protective order is entered." (Exhibit A hereto). On July 20, 2016, at Isaza Tuzman's arraignment, Gibson Dunn represented to the Court that it had "agreed to comply with [the Government's] proposed protective order until we come back to them with our concerns relating to it and then submit a hopefully a joint, if not a joint, separate proposals for your Honor's consideration[.]" The Government then produced discovery in the criminal case to Isaza Tuzman's lawyers based on these explicit representations that the terms of the protective order would be abided by until it was formally entered by the Court. After additional consultation between the parties, Government ultimately submitted a revised protective order, with the consent of defendant Isaza Tuzman, on June 20, 2017 (the "2017 Proposed Order"). (Dkt. 319).

As is standard in this District, both the 2016 Proposed Order and the 2017 Proposed Order limited the defendant's use of discovery produced in the above-captioned criminal matter. (*See, e.g.*, Dkt. ¶ 2). The 2016 Proposed Order and 2017 Proposed Order also allowed the use of criminal discovery in the parallel SEC civil action, *SEC* v. *Kaleil Isaza Tuzman*," 15 Civ. 7057 (AJN) (the "SEC Action"). (*See*, *e.g.*, Dkt. ¶ 2(a) (Confidential Information, including Rule 16 discovery, "[s]hall be used by the defendant and his counsel only for purposes of defending this criminal action and *S.E.C.* v. *Kaleil Isaza Tuzman* (the 'SEC Action')").[1] Neither proposed order allowed the use of criminal discovery in any other cases.[2]

On July 17, 2017, attorneys from Hoguet Newman Regal & Kenney LLP e-mailed the Government and indicated that they represented Isaza Tuzman in insurance litigation, *Hudson Insurance Company* v. *Isaza Tuzman, et al.*, Index No. 1555869/2016 (N.Y. Sup. Ct.) (the "Coverage Action"). (Exhibit B hereto). Counsel for Isaza Tuzman represented that Justice Shirley Werner Kornreich had asked the Government to help arrange for the civil deposition of Robin Smyth, the former CFO of KIT digital and one of the Government's cooperating witnesses. During a subsequent phone call, the Government specifically, and repeatedly, asked Hoguet Newman about its role, if any, in the criminal action. The attorneys at Hoguet Newman did *not* disclose that they represented Isaza Tuzman in the criminal case, and only said that they had consulted with Gibson Dunn.

On July 27, 2017, Isaza Tuzman's counsel at Hoguet Newman deposed Mr. Smyth for approximately seven hours. (Exhibit C hereto).[3] This deposition is concerning for a number of reasons. *First*, counsel for Isaza Tuzman used documents and information produced as discovery in the criminal matter — including a document bearing a USAO Bates number. This plainly violated the letter of the protective order. *Second*, counsel's questioning appears to have been a pretextual effort to prepare for the criminal trial and elicit information before § 3500 material is required to be disclosed. For example, counsel for Isaza Tuzman asked about the Government's trial preparation with Mr. Smyth, including which prosecutors and law enforcement agents were present for his meetings with the Government, who took notes, and what documents the Government had shown to Mr. Smyth, a key cooperating witness:

> Q. And did you review documents this week with the U.S. Attorney's office?
>
> MR. BACHNER: I want you to start asserting privileges.
>
> A. Under the advice of counsel, I assert my Fifth Amendment privilege against self-incrimination.
>
> Q. If you looked at documents with a prosecutor, how does that — how could that possibly incriminate you? The prosecutor was present when you were reviewing these documents, correct?
>
> MR. BACHNER: Are you asking for a legal conclusion?

---

1 The 2016 Proposed Order permitted the use of criminal discovery in the SEC Action with leave of the Court. The 2017 Proposed Order allowed the use of criminal discovery in the SEC Action without leave of the Court.

2 On March 1, 2016, the Honorable Judge Alison J. Nathan issued a memorandum and order granting the Government's opposed request for a limited stay of the SEC Action. The limited stay included a stay of any depositions of witnesses to be called in the criminal trial. (Dkt. 43).

3 The Government is not filing the transcript on CM/ECF and will provide a hardcopy to Chambers.

Q. Was the prosecutor present when you reviewed documents?

MR. BACHNER: Assert a privilege.

A. Under the advice of counsel, I assert my Fifth Amendment privilege against self-incrimination.

MS. JAROSLAW: We're going to take that up with the judge.

(Exhibit C at 15-17, 113-18). Counsel for Isaza Tuzman also asked various questions about Mr. Smyth's handwritten notebooks — a subject about which Isaza Tuzman may offer expert testimony, and have little, if any relevance, to an insurance litigation. (Exhibit C at 182-86).

On July 28, 2017, the Government emailed Isaza Tuzman's counsel at both Gibson Dunn and Hoguet Newman to raise concerns about the apparent improper use of criminal discovery in this insurance deposition. Tellingly, twenty minutes later, Hoguet Newman filed its notice of appearance in the criminal case. (Dkt. 339). On July 31, 2017, Gibson Dunn responded that there had been no violation of the protective order and provided various justifications with which the Government strongly disagrees. (Exhibit D hereto). Among other things, Isaza Tuzman's claims are not supported by the letter or spirit of the protective order, which plainly limit the use of criminal discovery to only this action and the SEC Action. Isaza Tuzman's strained reading effectively eliminates the protections of the protective order.[4]

[Additional Text on Following Page]

[4] Should a dispute about the permitted use of criminal discovery arise, paragraph 7 of both protective orders directed that the dispute be raised *before* the use of such discovery. ("If any dispute should arise between the parties . . . information shall be considered Confidential Information pending further Order of this Court.")

The Government thus respectfully requests that the Court enter the 2017 Proposed Order and confirm that its terms explicitly limit the use of materials produced in criminal discovery to the above-captioned criminal case and the SEC Action. Because of the breach of the protective order and counsel's failure to disclose their role in the criminal case, the Government reserves the right to object to the use of the deposition of Smyth at trial.

Finally, the Government notes that counsel plans to litigate Mr. Smyth's invocation of his Fifth Amendment rights during his recent deposition and compel him to answer questions about his involvement in the criminal scheme when he next travels to the United States to prepare for trial. (*See, e.g.*, Exhibit C at 210). This effort to conduct an end-run around § 3500 under the pretext of an insurance deposition while simultaneously seeking to delay the criminal trial is gamesmanship and but another reason to deny Isaza Tuzman's adjournment motion.[5]

Respectfully submitted,

JOON H. KIM
Acting United States Attorney

By: /s/

Damian Williams
Andrea M. Griswold
Joshua A. Naftalis
Assistant United States Attorneys
(212) 637-2298/1205/2310

cc: Defense Counsel (by CM/ECF)

---

[5] Isaza Tuzman also appears to be using the discovery process in the SEC Action as a criminal discovery tool, an issue identified by Magistrate Judge Jame L. Cott in connection with non-party subpoenas for documents issued by Isaza Tuzman. (Dkt. 111). Indeed, in a recent Order, Judge Cott asked Isaza Tuzman's counsel to explain how these applications were not simply an effort to avoid Judge Nathan's discovery stay, and Judge Cott posed the important question: "[I]s defendant Tuzman improperly attempting to use civil discovery to assist him in his upcoming criminal trial?" (*Id.*). Moreover, we understand that Isaza Tuzman is currently in default in meeting his discovery obligations in the SEC Action.

EXHIBIT C

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
200 Park Avenue
New York, NY 10166-0193
Tel 212.351.4000
www.gibsondunn.com

Avi Weitzman
Direct: +1 212.351.2465
Fax: +1 212.351.5265
AWeitzman@gibsondunn.com

August 7, 2017

VIA ECF & HAND DELIVERY

The Honorable Paul G. Gardephe
United States District Judge for the Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007-1312

Re: *United States v. Kaleil Isaza Tuzman*, S8 15 Cr. 536 (PGG)

Dear Judge Gardephe:

We respectfully submit this letter on behalf of Mr. Isaza Tuzman in response to the government's August 3, 2017 letter (Dkt. 350) regarding the July 27, 2017 deposition of the government's cooperating witness Robin Smyth in an insurance coverage litigation currently pending in New York State Supreme Court.

At bottom, the government's letter is an attempt to shield one of its cooperating witnesses, Robin Smyth, from damaging impeachment at trial. To that end, the government has manufactured a dispute regarding the terms of a proposed protective order not yet entered by this Court. But the government's letter omits critical facts that show that the government, not Mr. Isaza Tuzman, is the one engaged in gamesmanship. Indeed, the day after Mr. Isaza Tuzman's counsel deposed Smyth ***with the government's advance knowledge***, the government sent a frantic flurry of emails accusing Mr. Isaza Tuzman's counsel of misrepresentations. Each of the alleged misrepresentations is contradicted by the actual documentary record, as counsel for Mr. Isaza Tuzman explained in response to those emails. The government fails to disclose or provide any of this correspondence (which we attach as Exhibit A hereto) because it further exposes the ulterior purpose of this "protective order" dispute.

Rather, the record is clear that the government made the tactical decision to let Smyth's deposition proceed, and the government apparently now regrets that decision. Smyth's testimony and his repeated assertions of the Fifth Amendment during the deposition were simply astounding. He invoked the Fifth Amendment in response to numerous questions from which a jury can now infer that he lied to the government about Mr. Isaza Tuzman's alleged wrongdoing in an effort to reduce his sentencing exposure and jail time. He further showed great disdain for judicial authority and a willingness even to violate court orders.

Case 1:15-cr-00536-PGG Document 356 Filed 08/07/17 Page 2 of 10

GIBSON DUNN

His testimony, including his invocations of the Fifth Amendment, warrant adverse inferences in the SEC and insurance actions, and they are appropriate fodder for impeachment at Mr. Isaza Tuzman's criminal trial as well. *See infra* § 2. The government cannot now put the toothpaste back in the tube by manufacturing a dispute over compliance with the proposed protective order. The government's requested relief in the August 3 letter should be summarily denied.

1. *Mr. Isaza Tuzman Advised the Government of the Smyth Deposition, But the Government Made the Tactical Decision Not to Seek Any Limitations.*

Despite prior suggestions by the government to the contrary, Mr. Isaza Tuzman's counsel has at all times been transparent and forthright with the government regarding counsel's intentions to vigorously depose Mr. Smyth. *See* Ex. A. A brief review of the record—which the government notably omits—makes this plain.

First, weeks prior to the Smyth deposition, Mr. Isaza Tuzman filed his opposition to Hudson Insurance's motion for summary judgment in the insurance dispute. In that dispute, Hudson claims that it is not required to pay Mr. Isaza Tuzman's litigation costs in defense of the SEC action because a "Prior Knowledge Exclusion" contained in a Warranty Letter signed by Smyth excludes coverage for any matter as to which, on the effective date of the Warranty Letter, Smyth or Mr. Isaza Tuzman had knowledge of any circumstance that might give rise to a claim. Ex. B at 1-2. Hudson's motion for summary judgment relied entirely on Smyth's plea allocution; in Hudson's view, Smyth's admissions and inculpatory statements against Mr. Isaza Tuzman demonstrate a breach of the Warranty Letter. *Id.*; *see also id.* at 13-14. In response, Mr. Isaza Tuzman's opposition brief repeatedly makes clear his counsel's intent to vigorously cross-examine Smyth regarding, among other things, his allegations against Mr. Isaza Tuzman, his communications and interactions with the government, and his motivations to lie about Mr. Isaza Tuzman. *See id.* at 14 ("Smyth also benefited significantly from his allocution: he was released from jail and will likely receive a lesser sentence, which further undermines the credibility of his allocution. Due process and fundamental fairness require that Isaza Tuzman be given the opportunity to test Smyth's assertions by cross-examining him, particularly here where there are serious questions as to the truth of his allocution and the alleged wrongdoing at issue.").[1] Mr. Isaza Tuzman's summary judgment brief was filed on the public docket, so the government had unfettered access to review the brief before Smyth's deposition. And if the government failed to do so when it knew counsel was seeking Smyth's deposition, this certainly cannot be attributed to a lack of transparency or diligence on the part of Mr. Isaza Tuzman's counsel.

---

[1] *See also* Ex. B at 2-3 (Mr. Isaza Tuzman argued that "due process dictate[d] that [he] be given the opportunity to cross-examine Smyth about his assertions relating to" Mr. Isaza Tuzman's role in the alleged frauds, especially given that the insurance company's "entire motion [wa]s premised on the guilty plea of . . . Smyth, who had substantial incentives to lie—most notably, his desire to be released from jail and return home to Australia following

Second, prior to the noticed deposition of Smyth, counsel for Mr. Isaza Tuzman (Ilene Jaroslaw of Hoguet Newman) informed the government of the requested deposition, and the government tactically decided neither to assist in its scheduling nor take any action to limit it. *See* Ex. A. In an email on July 17, 2017, Ms. Jaroslaw informed the government that Justice Kornreich, the justice presiding over the insurance action, "indicated that Robin Smyth's deposition was necessary to resolve the insurance coverage issues . . . in the Coverage Action" and instructed Mr. Isaza Tuzman's counsel at Hoguet Newman to work with the U.S. Attorney's Office to facilitate the deposition in light of Smyth's return to Australia. Dkt. 350-2. Ms. Jaroslaw spoke to the prosecutors about the deposition the next day on July 18, 2017. During that call, as the prosecutors have acknowledged in writing (again not provided to the Court), the prosecutors informed counsel for Mr. Isaza Tuzman that, "we [the government] are not a party to your litigation and that we do not represent Mr. Smyth. We repeatedly urged you to contact Mr. Smyth's criminal counsel, Michael Bachner, to coordinate a potential deposition date for Mr. Smyth." Ex. C. Unlike in the parallel SEC action, the government chose to abstain from any involvement in the insurance action, despite the previously-disclosed broad scope of that deposition.

The government of course knew precisely when the deposition was going to occur. The prosecutors even met with Smyth for about three-and-a-half (3.5) hours a day *each of the three days* prior to his deposition. *See* Smyth Depo. Tr. (submitted to the Court in paper format as Exhibit C to the government's August 3, letter) at 15:7-16:7.[2]

The government must have (or at the very least should have) appreciated the risks to their case associated with Smyth's deposition before it occurred. Indeed, just the week prior to the deposition, the U.S. Attorney's Office in the Southern District of New York had to

---

entry of his guilty plea."); *id.* at 3 (through deposition questioning, Mr. Smyth would "be discredited and shown to be fabricating allegations against [Mr.] Isaza Tuzman").

[2] The government provided this Court a paper copy of the Smyth deposition transcript but did not file it on the public docket. The government did so without filing a sealing request, obtaining court approval, or seeking defendants' consent. Now, for the first time today, the government attempts to justify this conduct by contending, among other things, that the entire deposition transcript "was obtained in breach of the protective order . . . ." Ex. D. This newfound claim has no support in the language of the proposed protective order.

GIBSON DUNN

voluntarily dismiss criminal charges against two former JP Morgan traders as a result of evidence uncovered during the civil deposition of the government's principal cooperating witness Bruno Iksil, a/k/a "The London Whale"; that deposition revealed to the government that it "no longer believes that it can rely on the testimony of" Mr. Iksil. *See*, *e.g.*, *U.S. v. Martin-Artajo et al*, No. 13-cr-00707 (S.D.N.Y.), Dkt. 12; Matthew Goldstein, *U.S. Moves to Drop Charges Against 2 in 'London Whale' Scandal*, N.Y. Times, July 22, 2017, at B2. As the government was on notice that Smyth's deposition in the civil insurance action—where the issues overlap entirely with the underlying facts of the criminal case—would appropriately test Smyth's credibility, including his meetings with the government, the government cannot genuinely be surprised that a civil deposition of Smyth could expose its cooperating witness. The mere fact that the government prefers to litigate without a deposition on these matters in no way suggests that the deposition's questioning was improper.[3]

2. *Mr. Smyth's Assertions of the Fifth Amendment at His Deposition Expose His False Testimony and Overall Lack of Credibility.*

The government's *post hoc* distress over the testimony of its cooperating witness has nothing to do with the parties' proposed protective order and everything to do with the unraveling credibility of its "star" cooperating witness.

At his deposition, Smyth made prolific and damaging invocations of the Fifth Amendment regarding the lies he told the government about Mr. Isaza Tuzman—invocations that now reveal substantial credibility issues that will taint the Government's cooperating witness in this action. Below is just a sampling of the damaging Fifth Amendment invocations that would greatly undermine Smyth's testimony:

---

[3] The government's letter appears to endorse Smyth's invocation of the Fifth Amendment in response to questions regarding his meetings with the government in the days prior to his deposition, even though the answers to those questions could in no way be inculpatory. Furthermore, the government's claim that these questions improperly sought to circumvent Section 3500 is wide off the mark. *First*, the questions over which Smyth asserted privilege concerned the existence and circumstances of the meetings with the government, not the content of Smyth's statements. *Second*, the government's 3500 material rarely contains details about the government's preparation of its cooperating witnesses—often not even the dates of those preparation sessions.

Case 1:15-cr-00536-PGG Document 356 Filed 08/07/17 Page 5 of 10

GIBSON DUNN

Smyth Depo. Tr. Cite	Question	Answer
169:14-18	"And isn't it a fact that you would be committing perjury if you were to testify under oath that Mr. Isaza Tuzman knew you and Rima Jameel had created Jourdian Invest?"	"Fifth."
174:15-20	"And, in fact, any testimony that Mr. Isaza Tuzman was involved in fabricated contracts for the purpose of boosting KIT digital's revenue, that would be a lie, correct?"	"Fifth."
174:21-24	"And in fact you deceived Mr. Isaza Tuzman by fabricating the license agreements yourself, correct?"	"Fifth."
174:25-175:6	"And it's a fact, is it not, that you lied to Mr. Isaza Tuzman and never told him you were fabricating license agreements in order to artificially inflate KIT digital's revenues?"	"Fifth."
175:7-11	"And isn't it a fact that you deceived Mr. Isaza Tuzman by informing him that the Jourdian Invest loan was an arm's-length loan?"	"Fifth."
186:13-14	"Have you ever falsified evidence?"	"Fifth."
186:15-17	"Have you ever lied to the government?"	"Fifth."
209:13-15	"Did the U.S. Attorney's office write your guilty plea allocution?"	"Fifth."
215:3-10	"Did you make false statements to the government about Mr. Isaza Tuzman in an effort to reduce your sentence . . . for the crimes to which you pled guilty?"	"Fifth."
218:11-13	"Have you ever made an untrue statement regarding Mr. Isaza Tuzman?"	"Fifth."
218:14-16	"Have you ever made any untrue statement to the government?"	"Fifth."
231:14-18	[After Mr. Smyth refused to state the address at which he was staying with Robert Petty during his visit to Connecticut] "So you're refusing to answer where you're staying now . . . because it will incriminate you?"	"Yes. I'm taking the fifth."
231:19-22	"And will it incriminate you because you and Mr. Petty are conspiring to frame Mr. Isaza Tuzman?"	"The Fifth."
231:23-232:3	"Isn't it a fact that you and Mr. Petty have discussed presenting false testimony to implicate Mr. Isaza Tuzman in your crimes?"	"Fifth."

These assertions of the Fifth Amendment by the Government's cooperating witness are astonishing. In the face of accusations of lying to the government, including as to testimony he provided in his plea allocution, Smyth asserted his Fifth Amendment rights against self-incrimination, rather than deny those accusations as false. The fact that he did so will be admissible at trial to impeach Smyth's testimony against Mr. Isaza Tuzman. *See, e.g.*, *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980) (failure to speak, including to exculpate oneself, may be used as impeachment evidence in situations where "prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative"); *United States v. Zouras*, 497 F.2d 1115, 1120 (7th Cir. 1974) (defense witness could be impeached with prior silence; her prior "refus[al] to tell FBI investigators any story—including the one to which she testified [at trial]—reflects upon the credibility of that testimony"); *United States v. Sing Kee*, 250 F.2d 236 (2d Cir. 1957) (credibility of non-defendant witness could be impeached by prior invocation of Fifth Amendment).

Smyth also displayed his disdain and disrespect for the judicial system. By way of example, Smyth testified that he would **consider** complying with a court order to reopen his deposition only if it were "convenient" for him to return and depending on his other "commitments." Smyth Depo. Tr. at 243:14-244:6 ("Q. If the court in this case says we must continue your deposition on another date, if the court orders that, will you return? A. If it's convenient for me to return, yes."); *id.* at 244:20-25 ("Q. And if you're ordered to return in August will [you do] so if a court orders it? A. I don't know what my current situation will be, and so I will look at all my commitments at that stage and I will respond when I know what the request is."). In fact, Smyth stated that he "imagined" he would return if the government's attorneys told him to do so, but that he would "need to look at what [his] schedule" was if a court ordered him to return. *Id.* at 246:4-10. Smyth also invoked the Fifth Amendment multiple times when asked whether he would comply with his discovery obligations in the insurance case—including when asked whether he intended to violate a future court order by refusing to produce documents requested by Mr. Isaza Tuzman. *Id.* at 229:12-230:5.

Smyth also repeatedly abused his right to assert the Fifth Amendment by invoking it in response to questions where the answer plainly would not expose him to criminal liability. *See, e.g.*, *id.* at 16:22-17:17 (whether Smyth reviewed any documents with the U.S. Attorney's Office prior to the deposition, and whether any prosecutors were present when he reviewed documents); 166:4-7 (whether he had prepared with the U.S. Attorney's Office to provide testimony regarding the Enable allegations); 166:25-167:5 (whether he knew Stephen Maiden); 183:10-11 (where he stored notebooks he produced to the government), 210:16-24 (whether the government made "any kind of agreement" with Smyth in exchange for his guilty plea); 224:13-16 (whether he had ever received a subpoena to produce documents to the U.S. Attorney's Office); 226:8-11 (whether Smyth received a subpoena to produce documents to the SEC); 231:11-22 (where he was staying in Connecticut while in the United States for the deposition); 234:15-21 (same as to address of where he was staying); 241:23-242:14 (how many times Smyth met with the U.S. Attorney's Office in 2017).

3. ***Mr. Isaza Tuzman's Counsel Did Not Violate Any Protective Order.***

Faced with this devastating testimony from their cooperating witness, the government now contends that Mr. Isaza Tuzman's counsel violated a not-yet-ordered protective order as a result of the use at the deposition of a single document produced by the government in this action.[4] The government's assertions are unsupported by fact or law.

Initially, the government does not and cannot dispute that the government and SEC's productions were properly shared with the Hoguet firm. That firm filed notices of appearance in both the insurance and the SEC actions prior to the depositions, and also appeared with undersigned counsel at the last court conference in the SEC action on July 20, 2017. Moreover, Ms. Jaroslaw—a 23-year veteran and former supervisor in the U.S. Attorney's Office in the E.D.N.Y.—informed the government prosecutors in her July 17 phone call that she and others at her firm were working with counsel at Gibson Dunn, given the overlap in issues between the criminal, SEC and insurance actions. *See* Ex. A. Indeed, counsel at Hoguet Newman were retained to assist with the criminal action in early June 2017, and were working at undersigned counsel's direction. As a result, even before Ms. Jarsolaw filed her notice of appearance in this action, she had properly received any discovery produced in both this action and the SEC action pursuant to the terms of the proposed protective order. *See* Dkt. 319-1¶ 2(c)(ii) (permitting Gibson Dunn to disclose "Confidential Information" to "consultants, investigators, and/or other personnel retained by and/or working under the direction of defense counsel in connection with this action or the SEC Action").

In addition, any confidential documents produced by the government were properly shown to Smyth at his deposition because the protective order authorized defense counsel to disclose "Confidential Information" to "prospective witnesses, and/or their counsel" in this criminal action and the SEC action. *See* Dkt. 319-1 ¶ 2(c)(iii). Smyth indisputably was a prospective witness in those actions.

---

[4] As noted above, the Court never entered the proposed protective order. Counsel for Mr. Isaza Tuzman did agree to respect the terms of that proposed order as if it were entered. And for the reasons set forth below, there was no violation of any court-ordered—or even agreed-upon—confidentiality with respect to the government's production.

GIBSON DUNN

Moreover, the government distorts the protective order's plain terms to falsely suggest that it permits use of discovery only in and during the criminal action and SEC action. Dkt. 350 at 3 (asserting that the proposed protective order "plainly limit[s] the use of criminal discovery to only this action and the SEC Action"). The proposed protective order says no such thing. Rather, the proposed protective order states that any discovery produced in the criminal action "[s]hall be used by the defendant and his counsel only for purposes of ***defending*** this criminal action and . . . the []SEC Action." Dkt. 319-1 ¶ 2(a) (emphasis added). The word "defending" in the provision permits any use relevant to the defense of the criminal and the SEC action. The Smyth deposition, which was taken in connection with the related insurance action, was clearly relevant to the defense of the criminal and SEC actions, in two important respects.

First, indisputably, showing the jury in this case that Smyth's claims of wrongdoing against Mr. Isaza Tuzman consist of self-serving falsehoods would greatly weaken the government's claims against Mr. Isaza Tuzman. The crux of the insurance action turns on the testimony of Smyth implicating himself and Mr. Isaza Tuzman in fraudulent conduct. The insurance action, and Smyth's credibility, thus directly overlap with the underlying fraud issues in the criminal and SEC actions. Accordingly, undermining the credibility of Smyth's fraud allegations against Mr. Isaza Tuzman in the insurance action is clearly relevant to, and assists in the defense of, this case and the SEC action.

Second, the insurance coverage dispute implicates Mr. Isaza Tuzman's ability to pay for his chosen defense counsel in the criminal and SEC actions through continuing D&O coverage. As such, the insurance coverage dispute (and the depositions therein) are critical to Mr. Isaza Tuzman's defense in the criminal and the SEC actions, not least of which because they directly implicate his Sixth Amendment right to ensure continued representation by counsel of his choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). That fundamental provision "'guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire,'" subject to certain limited exceptions. *Luis v. United States*, --- U.S. ----, 136 S. Ct. 1083, 1089 (2016) (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989)).

The government also undermines its claim of breach by tacitly conceding that it perceives an ambiguity in the proposed protective order. Specifically, the government requests that, in addition to entering the proposed protective order, the Court also "confirm that its terms **explicitly** limit the use of materials produced in criminal discovery to the above-captioned criminal case and the SEC Action." Dkt. 350 at 4 (emphasis supplied). But that is not what the proposed protective order says. Dkt. 319-1 ¶ 2(a). In any case, under well-established contract interpretation principles, "a court should construe ambiguous language against the interest of the party that drafted it," *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S.

52, 62 (1995), including where, as here, the government was the drafter, *United States v. Seckinger*, 397 U.S. 203, 210 (1970).

Finally, the government has not claimed and cannot possibly show any harm from the disclosure of confidential information subject to the proposed protective order during Smyth's deposition.[5] The excerpts from the notebook presented to Smyth during the deposition were notebooks that Smyth *himself* produced to the government, and which were produced to counsel in this and the SEC action. *See* Smyth Depo. Tr. at 182:7-186:12 (marked as Exhibit 13). The government does not even attempt to explain how showing a deponent his own notebooks could compromise confidentiality. And the one document shown to Smyth bearing a USAO bates stamp was merely an organizational chart for KIT digital—the company over which Smyth presided as CFO. *Id.* at 90:10-23 (marked as Exhibit 12).

Accordingly, there was no violation of any court-ordered—or agreed-upon—protective order with respect to the government's production.

4. *The Government's Requested Relief Should be Denied.*

Finally, the government's requested relief is nonsensical. The government asks the Court to deny the motions of Mr. Isaza Tuzman and Omar Amanat for a short trial adjournment, somehow due to its unrelated and meritless protective order breach claim. In May 2017, Mr. Isaza Tuzman sought a short trial adjournment of a single month (no more) due to the observance of the Jewish holidays during the first two weeks of trial. *See* Dkt. 291. The adjournment request, made two months prior to the deposition of Smyth, had nothing to do with the protective order or the Smyth deposition. This request, and the government's effort to retroactively take an interest in Smyth's deposition, begs the question of which party here is engaged in "gamesmanship."[6]

---

[5] The government inexplicably failed to seek a protective order from this Court governing Mr. Isaza Tuzman's use of discovery for approximately one year since the production of discovery, until defense counsel alerted the government of this omission on June 14, 2017 in connection with motion practice filed in the SEC action that potentially implicated the not-yet-submitted protective order. *See* Ex. E. This further confirms defense counsel's good faith efforts to adhere to the proposed protective order, and that the government's protestations now are asserted for an ulterior purpose.

[6] Buried in a footnote, the government accuses Mr. Isaza Tuzman of being in default of meeting his discovery obligations in the SEC action. Dkt. 350 at n.5. This is yet another

* * *

The government's August 3 letter is a transparent attempt to put the genie back in its bottle and protect its key cooperating witness from appropriate impeachment based on his sworn testimony in the insurance action. Any regret the government may have about its tactical decision to sit out the insurance dispute does not warrant its baseless accusation that counsel violated the terms of a proposed protective order. The requests in the government's letter of August 3 should be denied.[7]

Respectfully submitted,

/s/ Avi Weitzman

Avi Weitzman

cc. All Counsel of Record (via ECF)

---

unfounded allegation. To the contrary, Judge Cott recently discouraged any effort by the SEC to pursue discovery from Mr. Isaza Tuzman on the eve of the criminal trial, stating: "If you [Mr. Isaza Tuzman] have an October trial [in the criminal action], you should be focusing on your October trial and not fuzzing [sic] around with document production in a civil case where there is otherwise a stay of other discovery and there is a motion to dismiss pending." Dkt. 334-9 at 30.

7 Mr. Isaza Tuzman has no objection to entry of the proposed protective order as agreed upon by the parties.